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82-250

No. _____

In The

Supreme Court of the United States

October Term, 1982

DR. WILLIAM TRULY,

Petitioner

VS.

**Madison General Hospital,
Sidney L. Whittington, Jacob M. Ritchey, Hite Wolcott,
Donald Hawkins, Maybeth Gordan, L.C. Harris,
Strickland Sligh and Dr. T.O. Bailey, Dr. G.A. Carmichael,
Dr. Joe W. Terry, Dr. C.H. Heywood, Dr. George Allard,
Dr. A.P. Durfey, Jr., Dr. A.P. Durfey, Sr.
Dr. Mitchell B. Wells, Dr. Allen Roark,
Dr. William B. Featherston, and Dr. Robert Surratt,**

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Of Counsel:
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QUESTIONS PRESENTED

(1) Whether respondents' failure to advise petitioner, in writing, of their specific reasons for denying him medical staff membership prior to petitioner being afforded an administrative hearing, violated Due Process and the Equal Protection Clause of the Fifth and Fourteenth Amendments to the Constitution.

(2) Whether petitioner's public criticism of local physicians and his political interest and involvement in politics was a substantial or motivating factor in respondents' decision to deny petitioner medical staff membership and thereby violate his rights secured by the First and Fourteenth Amendments to the Constitution.

PARTIES TO THIS PROCEEDING IN THE COURT OF APPEALS

Plaintiff-Petitioner

Dr. William Truly

Defendants-Respondents

Madison General Hospital
Sidney L. Whittington
Jacob M. Ritchey
Hite Wolcott
Donald Hawkins
Maybeth Gordan
L.C. Harris
Strickland Sligh
Dr. T.O. Bailey
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TABLE OF CONTENTS

Page

Questions Presented i

Parties to This Proceeding in the Court of Appeals ii

Table of Authorities iv

Prior Opinion 2

Jurisdiction 2

Statutes Involved 2

Statement of the Case 2

Reason for Granting the Writ 4

Conclusion 8

Appendices

Appendix A (Opinion Below, Report and Recommendation of United States Magistrate) A-1

Appendix B (Opinion of District Court) B-1

Appendix C (Opinion of Court of Appeals) C-1

Appendix D (Conflicting Opinion) D-1

Appendix E (Statutory Materials) E-1

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. Mango, 380 U.S., 545, 550 (1965) 5

Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir.) cert. denied, 368 U.S. 930 (1961) 5,6

Ferguson v. Thomas, 430 F. 2d 852 6

Mancuso v. Taft, 476 F. 2d 187 (1st Cir. 1973) 8

Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 2 Ed 2d 471 (1977) 6

Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1949) 5

Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173 (1971) 7

STATUTES

28 U.S.C., Section 1254(1) 2

42 U.S.C., Section 1981, 1982, 2000(d) et seq. 2

Mississippi Code Section 41-13-15 through 41-31-51, 1972 Annotated 2

CONSTITUTIONAL PROVISIONS

First Amendment 2,7,8

Fifth Amendment 2

Fourteenth Amendment 2,5

MISCELLANEOUS

Federal Rules 5

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DR. WILLIAM TRULY,

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VS

Madison General Hospital, Sidney L. Whittington, Jacob M. Ritchey, Hite Wolcott, Donald Hawkins, Maybeth Gordan, L.C. Harris, Strickland Sligh and Dr. T.O. Bailey, Dr. G.A. Carmichael, Dr. Joe W. Terry, Dr. C.H. Heywood, Dr. George Allard, Dr. A.P. Durfey, Jr., Dr. A.P. Durfey, Sr., Dr. Mitchell B. Wells, Dr. Allen Roark, Dr. William B. Featherston, and Dr. Robert Surratt,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on April 22, 1982.

PRIOR OPINION

The unreported opinion of United States District Court Judge, Honorable Harold Cox, denying petitioner's Bill of Complaint for a preliminary and permanent injunction to enjoin respondents from denying petitioner medical staff membership appears in Appendix C, *infra*. The opinion of the Fifth Circuit Court of Appeals is reported in F.2d and appears in Appendix D, *infra*.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

STATUTES INVOLVED

The federal statutes involved are 42 U.S.C. Section 1981, 1983 and 2000(d) et. seq., as are the First, Fifth and Fourteenth Amendments to the Constitution.

Mississippi Code Sections 41-13-15 through 41-31-51, 1972 Annotated. Pertinent statutory provisions are set forth in Appendix A.

STATEMENT OF THE CASE

This is a lawsuit by a Black physician practicing in Madison County, Canton, Mississippi, who was denied medical staff membership at the respondent Madison General Hospital, a public supported county hospital.

Petitioner brought the suit against respondent hospital, its medical staff and Board of Trustees, in the United States District Court for the Southern District of Mississippi, pursuant to the First, Fifth and Fourteenth Amendments and under 42 U.S.C., Sections 1981 and 1983.

Petitioner alleged in his suit that respondents' denial to him of medical staff privileges was based on his race, his exercise of First Amendment protected rights, and that he was not afforded due process in the administrative hearings held before the medical staff and Board of Trustees.

At the trial, it was shown that after petitioner received his initial notice from the respondents that his application for medical staff membership received an adverse recommendation, he requested specific reasons for the adverse recommendation (R. 25). Respondents answered with a letter dated April 13, 1978, listing ten (10) reasons for the adverse action on his application.

Among the reasons listed by the respondents was their concern over a "probable inability of petitioner to work with the administration and staff of the Hospital as evidenced by numerous instances of severe public criticism of the administration and staff by petitioner during the last few years," (R. 692) and allegations by patients that petitioner was unavailable after office hours (R. 25).

Petitioner, through his attorney, prior to the hearing on his appeal of respondents' adverse action on his application requested more specific information regarding the instances when respondents alleged that he was unavailable to his patients after hours and specific instances where he had publicly criticized the Hospital and its staff.

Respondents answered petitioner's request by letter dated May 2, 1978 (R. 25) wherein they advised petitioner that the information he requested regarding adverse statements made by his patients was unavailable and could not be revealed because of doctor/patient privileges, and that the information he requested regarding specific instances of public criticism could be obtained by petitioner by contacting "any of the Jackson, Mississippi, stations or newspapers."

Petitioner was not advised until the date of the hearing (May 18, 1980) that the public criticism by him against respondents referred to a 1975 television program entitled **Probe** wherein he was interviewed on the subject of "patient care in the Madison County, Mississippi, area" (R. 119, 232).

Proof at trial also showed that respondents denied petitioner medical staff membership for reasons that included his "political interest," and his announced candidacy for Mayor of Canton, Mississippi (R. 25, 36, 315, 500).

Respondents also testified at trial that although they denied petitioner medical staff membership, they would permit him to admit a patient to the emergency room of the Hospital and treat him in order to save his life and then, thereafter, if he is to be admitted to the Hospital, the patient must be turned over to a staff physician (R. 115).

Respondents and the trial court dismissed the factors of competency and ethical conduct as matters upon which petitioner was denied medical staff membership.

Despite the finding that competency and ethical conduct was not an issue, and that petitioner had limited emergency room prileges, the trial Court denied plaintiff's application for injunctive relief (R. 241), which opinion was affirmed by the Court of Appeals, in an opinion by Judge Brown, Judge Goldberg and Judge Gee.

REASONS FOR GRANTING THE WRIT

(1) In endorsing the trial court's dismissal of petitioner's application for injunctive relief on the basis that petitioner had not been denied procedural due process, the court below has narrowed the individual's most basic and fundamental requirements under minimum procedural due process, that of being advised of the cause or causes of adverse action in sufficient detail to fairly enable one to show error that may exist; being advised of the names and the nature of the testimony of witnesses against him; and being given a reasonable time after such advice to be heard in his own defense.

In this instance the court below has found that referring petitioner to newspapers and television stations for reference to events spanning more than five years was sufficient enough to comply with minimum procedural due process.

The effect of the lower court's decision is to endorse what it referred to as "notice pleading" as being adequate in providing one entitled to a due process hearing, with the reason or reasons for denial of public employment.

In comparing the notice provided petitioner to that of the "notice pleading" requirements under the Federal Rules, the lower court overlooked the fact that under the Federal Rules a litigant has available to him the discovery provisions under the Federal Rules. No such provisions are made under most administrative proceedings. Here, petitioner had no enforceable discovery rules to require respondents to reveal the specific reasons for their denial of medical staff membership. The lower court now states that there is no notice requirement beyond that provided for under the Federal "notice pleading" requirement.

This proposition is contrary to the prior established precedent of the Fifth Circuit and of this Court.

The basic principal of the Due Process Clause of the Fourteenth Amendment is that no person shall be deprived of his life, liberty or property without an opportunity to be heard. *Armstrong v. Mango*, 380 U.S. 545, 550 (1965); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1949). The guarantee that a party whose rights are affected must be given the opportunity to defend himself is based upon the most elementary concept of justice.

The key to an effective hearing is, of course, the opportunity of each party to know and meet the evidence and argument against him. Such a hearing represents the sole method of protecting against possible arbitrary, invidious or discriminatory action which would prejudice an individual's substantive right.

The following have traditionally been held essential prerequisites to meeting the requirements of minimum procedural due process.

(1) the right to be advised of the cause or causes for denial of a right or privilege in sufficient detail to fairly enable one to show error that may exist.

(2) the right to be advised of the names and the nature of the testimony of witnesses against him.

(3) the right to be allowed a reasonable time after such advice to be heard in one's own defense. *Dixon v. Alabama*

State Board of Education, 294 F.2d 150 (5th Cir.) cert. denied, 369 U.S. 930 (1961); *Ferguson v. Thomas*, 430 F.2d 852.

The "notice pleading" requirement as announced by the lower court amounts to a substantial departure and reduction in the procedural requirements which petitioner was entitled to and as announced in *Dixon* and *Ferguson*, *supra*.

To let stand this proposition by the lower court could alter those fundamental protections afforded under the Fourteenth Amendment as reflected in the prior holdings of this Court.

(2) The trial court found that the reason listed by respondents as grounds for their denial of medical staff membership, that of petitioner's public criticism of local physicians and his involvement in local politics, was not the substantial or motivating factor in respondents' decision to deny him staff membership.

This finding by the trial court was clearly erroneous and contrary to law and the overwhelming weight of the evidence.

The burden of proof in a claim for denial of public employment for the exercise of a protected activity as outlined in this court's opinion in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 2 Ed 471 (1977), rest with the petitioner. *Mt. Healthy*, *supra*, held that the complainant must show that relevant conduct is constitutionally protected, and that said conduct was the substantial or motivating factor in the unfavorable action taken against him.

The trial court found that petitioner's competency and ethical conduct did not form the basis for respondents' denial to him of medical staff membership, and by implication, found that petitioner's ability to work with the hospital staff and other physicians was not at issue since petitioner did have limited emergency room privileges to treat patients in emergency situations (R. 950, 952). This limited privilege bestowed upon petitioner by respondents, negated any claims by respondents that they were concerned with petitioner's ability to work harmoniously and efficiently with other hospital staff members.

Absent competency, ethical conduct, and ability to work with others as legitimate factors for respondents' denial of medical staff membership, and other reasons listed by respondents must be given close scrutiny and observed to determine if they are "reasonably related to the operation of the hospital." *Sosa v. Board of Managers of Val Verde Memorial Hospital*, 437 F.2d 173 (1971).

The other reasons listed by respondents as grounds for denial of medical staff membership, as shown by the record from the trial court, were remote and unrelated to the operation of the hospital and clearly pretextual in appearance and in fact.

An example of the respondents' foray into areas unrelated to the operation of the hospital was their attack on the method employed by the State of Mississippi to grant petitioner a license to practice medicine (R. 41, 427, p. 10, 11). Despite the acknowledged fact that petitioner held a valid Mississippi license to practice medicine, respondents continued to insist that petitioner had not met his burden of satisfying their curiosity in justifying the manner in which he was licensed by the State of Mississippi (R. 41, p. 10, 11).

Once the respondents' irrelevant considerations have been stripped away, and petitioner's professional qualifications have been dismissed as an issue, you have left only the exercise by petitioner of his constitutionally protected rights as grounds for respondents' denial of medical staff membership. It, thus, was the "motivating factor" in respondents' decision.

This court should be cautious not to permit the dilution of the protection afforded by the First Amendment. There is great danger here of erosion if the lower court's decision is left standing.

The signal would be sent that the highly conjectural criterion of temperamental unsuitability is a valid basis for determining whether a person is entitled to public employment. It will become a tempting subterfuge for denial of employment when other factors, such as the exercise of a protected activity, forms the real basis for the adverse action.

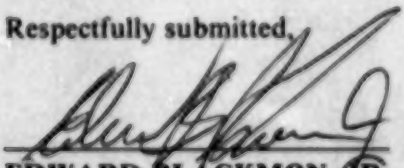
The physician's attitude, as long as it does not interfere with the delivery of health care, should have no bearing on his admission to staff membership at a public hospital.

Likewise, the physician's political interest should not bar him from staff membership at a public hospital. Candidacy for political office is an especially high form of expression, one for which public employees are well suited. *Mancuso v. Taft*, 476 F.2d 187 (1st Cir. 1973). Thus, any restriction on candidacy and political involvement must be reviewed with special care, since it affects a fundamental human right.

CONCLUSION

This Court should grant the petition for certiorari and hear the issues raised in this important area of the First Amendment and civil rights.

Respectfully submitted,

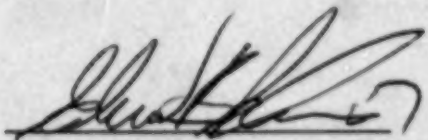


EDWARD BLACKMON, JR.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Edward Blackmon, Jr., attorney of record for the petitioner in the above entitled action, hereby certify that I have this day mailed, postage prepaid, by United States Mail, three (3) true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, to the Honorable Stanley F. Stater, III, Montgomery, Smith-Vaniz & Stater, Post Office Box 284, Canton, Mississippi 39046.

This the 11th day of August, 1982.



EDWARD BLACKMON, JR.

— APPENDIX A —

UNITED STATES DISTRICT COURT

Southern District of Mississippi

Jackson Division

Civil Action No. J78-0471(C)

DR. WILLIAM TRULY

Plaintiff

VS.

MADISON GENERAL HOSPITAL et al

Defendants

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

Plaintiff, Dr. William Truly, a black physician, alleges that his application for medical staff membership in defendant hospital was rejected by the Defendants because of his race and because of the exercise of his constitutional rights of speech, petition, assembly and association, and that he was denied due process in the consideration of his application, in violation of 42 U.S.C. 1981, 1983 and 2000(d) et seq.

Dr. Truly graduated from Meharry Medical College in Nashville, Tennessee, in 1970, served a year of internship, and in July 1971, moved to Fayette, Mississippi. Under a one-year temporary license he began work as a physician with the Medgar Evers Comprehensive Health Center. After his involuntary termination at the Evers Center because of what he views as "political differences," he moved to Jackson where he took but failed the Mississippi medical licensure examination. His temporary

license expired, he worked as a "clinician" at the Jackson-Hinds Comprehensive Health Center for several months, then passed the licensure examination of the State of Georgia. He immediately applied for and was granted a Mississippi license on the basis of reciprocity. About this time he was named medical director of the new federally funded Madison-Yazoo-Leake Family Health Center (MYL), in Canton, Mississippi.

In August 1973 Dr. Truly applied to the Madison General Hospital for medical staff privileges. As a part of the routine processing of his application, references were obtained by the hospital from Charles Evers, chairman of the Board of Directors of the Evers Clinic and from Mrs. Gertrude Williams, hospital administrator of the Jefferson County Hospital, both in Fayette, where Dr. Truly practiced medicine. Although these recommendations were unfavorable to Dr. Truly, it was found that Dr. Truly was disqualified from medical staff privileges because he was not a resident of the county in which the hospital is located. No review was sought of this denial.

Between 1973 and 1977 Dr. Truly was primarily engaged in the practice of medicine as a physician at the MYL Clinic, but at various times engaged in private practice both in the Jackson and Canton areas.

On August 23, 1977, Dr. Truly made a second application for staff privileges, and the hospital mailed questionnaires to references listed by Truly on the application form. S.L. Whittington, hospital administrator, testified that several of these persons failed to respond to the questionnaire by the time the medical staff met and considered the application in November 1977, prompting the staff to pull the 1973 application with its two unfavorable recommendations. On November 22, 1977, Mr. Whittington notified Dr. Truly that the medical staff had recommended to the Board of Trustees that the application be denied. Defendants enumerated ten reasons for their adverse recommendation on Dr. Truly's application.

In accordance with hospital regulations, Dr. Truly sought and was given a hearing by a committee of the medical staff on May 18, 1978. Prior to the hearing date, Dr. Truly placed ads in the

county newspaper publicizing his position and rebuking the hospital for its action. On the date of the hearing, with Dr. Truly's acquiescense, if not at his instigation, a large number of supporters gathered in the hospital corridors and the waiting rooms, along with television news reporters. Dr. Truly was allowed to appear at the hearing with counsel, to present witnesses and to question members of the committee. At the conclusion of the hearing, the medical staff committee again recommended that Dr. Truly be denied appointment to the medical staff.

Dr. Truly sought an appeal to the Board of Trustees. Again in the midst of reporters from the news media and the presence of supporters lining the waiting room and halls of the hospital, a hearing was held on July 24, 1978, before a committee of the Board of Trustees. Dr. Truly and his attorney were allowed to participate fully, present briefs, oral and documentary evidence, and opening and closing arguments. Subsequent to the July 24 hearing, new evidence was received by the committee concerning what was viewed as irregularities in the licensure of Dr. Truly, Dr. Truly's Medicaid Provider Numbers, and discrepancies about other hospital applications. For this reason, another hearing dealing with these matters was held on September 14, 1978, to allow Dr. Truly and his attorney to respond. On September 25, 1978, the committee of the Board of Trustees made its final report to the Board of Trustees recommending that the medical staff action regarding Dr. Truly's application be upheld, and the Board of Trustees approved this action at their September 1978 meeting. Upon receipt of notice of the adverse decision, Dr. Truly filed this action.

A Physician has no constitutional right to staff privileges merely because he is licensed to practice medicine. *Sosa v. Board of Managers of Val Verde Hospital*, 437 F.2d 173 (5th Cir. 1971). He cannot, however, be denied staff privileges for a constitutionally impermissible reason such as race or the assertion of rights guaranteed by the constitution. *Ferguson v. Thomas*, 430 F.2d 853 (5th Cir. 1970).

Plaintiff first contends he was denied staff privileges because of his race. The Magistrate notes that there are seven full-time

active staff member physicians at Madison General Hospital, five white and two black. Although several black physicians have served on Emergency Room staff service while interns or residents at nearby University Medical School, only three black physicians have ever sought full time staff privileges in the 15-year history of the hospital: Dr. G. A. Carmichael, who was admitted when the hospital was opened in the mid-1960's, Dr. Harry Bartee, who was admitted in 1979, and the plaintiff.

Evidence of racially discriminatory intent presented by plaintiff was primarily in the form of historical background. Madison County is a predominantly black rural county. For many years physicians in Madison County, including some named defendants, had separate waiting rooms for black and white patients, in accordance with state law. Kings Daughters Hospital, the predecessor of Madison General Hospital, was a segregated facility. No black physicians were on the medical staff, although it was Dr. Carmichael's testimony that he had been invited to join the staff at one time. When Madison General opened in 1966 as an integrated facility, Dr. Carmichael joined the staff. Two other black physicians resided in Madison County at that time, but neither has sought hospital staff privileges, and apparently both, now elderly, are retired.

The remaining evidence presented by plaintiff to indicate a racially biased climate was in the form of opinions and conclusions concerning the small number of black physicians in the American medical community, the existence of two national and state medical associations, one predominantly black, one predominantly white, poor health statistics for rural blacks, and local opposition to the funding of the MYL clinic.

Dr. Truly, after being refused permanent staff privileges, sought temporary privileges pending his appeal. This was improperly denied, contends Truly, in view of the granting of temporary privileges under similar circumstances to Dr. Thomas Keister, a white physician. The only reason for their disparate treatment, he argues, is racial bias.

Dr. Keister worked at Madison General Hospital as an Emergency Room staff physician for several years while a student at

University Medical School, and has done some work at the clinic of Dr. C. H. Heywood, one of the defendants. Dr. Keister was granted temporary staff privileges for three months (January through March, 1980) while Dr. Heywood was out of the country in order to follow Heywood clinic patients. Dr. Keister never sought full staff privileges, and is now employed at the University Medical Center.

When Keister was at the University Medical Center serving as a trainee in the psychiatric clinic, he had some personal problems and left the hospital for four days without arranging in advance for his charts to be worked or his patients to be supervised by another physician. Upon his return to the hospital, Keister was assigned to another service and served his six-week training period in psychiatry at a later time. Truly believes this is comparable to his experience in Fayette.

It was the testimony of Whittington that he had no knowledge of this incident in Keister's background, that it had not been mentioned in references from Keister's supervisors, and that the matter had only come to light in the two or three months prior to trial of this cause. Whittington testified that Keister had fine recommendations, and that by the time the incident was revealed to the hospital, Keister had served the hospital well for several years as Emergency Room physician. Whatever doubt that incident might have cast in the minds of the staff about Keister would have been dispelled by the staff's personal knowledge of his performance. The factual situations before the committee at the time the requests were considered were most dissimilar, and the granting of temporary privileges to Keister and the denial of temporary privileges to Truly are not the product of racial bias.

All members of the committee questioned at the trial of this case (including Carmichael) testified that race was never discussed at the meetings held concerning the Truly application and was not a factor in its consideration. Race was not mentioned in any report or in the transcript of the hearings before the committee or in any document except those comments and documents generated by the plaintiff himself.

The total evidence leads the Magistrate to believe that race was not a motivating factor in the denial of staff privileges to Dr. Truly. The circumstances surrounding the granting of temporary privileges to Dr. Keister are significantly different from Dr. Truly's situation, where all the adverse information was before the committee and no background of personal observation of Dr. Truly and his work could fill in any gaps in his application.

The most racially biased comments and conduct in the lengthy proceeding before the Magistrate were from the plaintiff and his witnesses, who repeatedly expressed hostility and condescension towards whites. No such offensively biased behavior or language was noted in the defendants or their witnesses at any time during this hearing.

Plaintiff next contends that his application was denied because of the exercise of his constitutional rights of speech, petition, assembly and association.

In 1973 Dr. Truly first crossed swords with members of the Madison General Hospital staff at a meeting of the Mississippi Hospital Association concerning the funding of MYL Clinic. Persons with the hospital sought the funding for the hospital, to improve and expand its facilities, while others, including Truly, sought the funding for MYL Clinic. Witnesses who attended the sessions testified that Truly publicly called Whittington a racist and charged that the staff of Madison General Hospital "let people die".

In 1974 plaintiff granted a television interview which was later broadcast as a part of an investigative report on medical care for blacks in Madison County on a local television program, "Probe". The program explored tensions which existed between MYL Clinic and Madison General Hospital, including charges that the hospital refused to admit patients of MYL clinic. Hospital Administrator Whittington also appeared on the program.

In that interview Truly sought to impress upon the viewer the high quality of the care rendered by the MYL Clinic by com-

paring it with that rendered by the rest of the Madison County medical community. A portion of his statement was:

> [P]atients frequently tell me that the white physicians in this community do not touch them. In other words, they do not place their hands upon them when the black patient goes to the white physician's office.

The white medical community was incensed at the statement, not only, they said, because they knew it to be untrue, but because Truly had made no effort to investigate the allegations of his patients (which he admits) before making the statement on television. Witnesses from the medical community testified that they believed the statement under those circumstances showed poor judgment and an irresponsible attitude.

During the time Dr. Truly's application was under consideration, he was a candidate for Mayor of the City of Canton. More than one physician was concerned about Dr. Truly's ability to run the city as Mayor and carry on full-time staff assignments, including 24-hour "on call" Emergency Room duty. Dr. Truly's response was:

> I think that, how I feel about it is that God has blessed me. I think that one of the things that he has blessed me with is that I can do more than one thing and I am not being braggadocious. I write poetry, I write lyrics, I was once one of the editors for the school paper. I speak, so God has blessed me with doing different kinds of things and I thank him for that.

On July 20, 1978, while his application was under consideration and while his campaign for Mayor was ongoing, Truly published in the Madison County Herald, the local newspaper, a 12" x 13" advertisement which exhibited the contents of three letters sent from the hospital to Dr. Truly concerning his application and in which he responded to a news story which appeared in an earlier edition of the paper. This ad appeared four days before the hearing before the Hospital Board of Trustees.

Plaintiff's attorney, who is also attorney for the NAACP in Madison County, was instrumental in arranging for media coverage and organization of the demonstrations which took place on May 18, 1978, at the hearing before the Ad Hoc Committee of the Medical Staff and on July 24, 1978 at the hearing

before the Board of Trustees. As best the Magistrate can determine, plaintiff approved and encouraged this display of support.

Staff and board members who were involved in the review process saw these incidents as strong-arm tactics, in violation of the pledge which Truly signed as a part of his application for staff membership: "I pledge myself to shun unwarranted publicity . . . . ". If Truly was unwilling to keep this pledge, they reasoned, he would be equally unable to follow the by-laws and regulations of the hospital as a staff member.

No witness argued that, under our Constitution, Dr. Truly did not have the right to do as he did; nor did any witness express the belief that criticism of the medical profession was unhealthy where needed. Rather they pointed to what they deemed to be the irresponsible, publicity-seeking manner in which Dr. Truly sought to present his case as being unprofessional and harmful both to the patient and to the medical profession. They saw such harsh criticisms made without prior investigation or inquiry and broadcast on television as an exhibition of extremely poor judgment. His arrogant, self-affirming manner both prior to the hearings and during the hearings offended them personally and professionally. They believed a working relationship with such a physician would be impossible.

The Magistrate concludes that it was not the exercise of Dr. Truly's constitutional rights which brought about the denial of staff privileges, but his posture in this entire proceeding. The two records before this court, and the trial on the merits revealed not a professional dedicated to the betterment of health care and the upgrading of the medical profession, but a self-oriented individual demanding that things be done only his way. The First Amendment may grant him the right to create a scene, but it does not require the medical community to condone or support him.

The plaintiff next contends that the reasons outlined for denial of his staff privileges did not constitute a reasonable basis but, to the contrary, were arbitrary and capricious.

The ten reasons, as spelled out in a letter to Dr. Truly, were:

(1) two unfavorable references from the 1973 application;

(2) the statement of the present administrator of the Jefferson County Hospital that while on staff there Dr. Truly kept poor medical records and that upon leaving Fayette he failed to complete his patient records;

(3) the statement in Dr. Truly's application that he enjoyed full staff privileges at a Mound Bayou, Mississippi, hospital, when information obtained from that hospital indicated that he served as an Emergency Room physician only. The staff was also concerned how he could maintain a practice in Canton and fulfill staff responsibilities at a hospital 100 miles away;

(4) inability of the hospital to ascertain the actual residence of Dr. Truly;

(5) complaints from patients and hospital employees about Dr. Truly's unavailability after regular office hours;

(6) insufficient explanation of relative short employment time at previous jobs, with no explanation for leaving MYL clinic;

(7) insufficient medical credentials and experience upon which to judge his professional competence;

(8) concern of staff over Dr. Truly's ability to work with the administration and staff of the hospital, as evidenced by numerous instances of his "severe public criticism of the Administration and staff" in recent years;

(9) concern for the apparent inability of Dr. Truly to follow the By-laws and Rules and Regulations of the hospital;

(10) belief of the members of the medical staff that they would be unable to work effectively with Dr. Truly.

Staff appointments may be constitutionally refused on any reasonable basis such as professional and ethical qualifications of the physician or the common good of the public and the hos-

pital. *Sosa v. Board of Managers of Val Verde Hospital, supra.* Substantive due process requires that these standards be reasonable and applied without arbitrariness or capriciousness. *Woodbury v. McKinnon*, 447 F.2d 839 (5th Cir. 1971).

The two adverse recommendations were submitted by Charles Evers, chairman of the Board of Directors of the Evers Clinic, and Mrs. Gertrude Williams, Administrator of the Jefferson County Hospital, both non-physicians.

To the questions submitted by defendant hospital, Mrs. Williams responded that Dr Truly was not conscientious in maintaining accurate medical records, did not discharge his emergency room duties satisfactorily, did not always conform to the medical staff bylaws, rules and regulations, did not keep records up to date, and did not discharge committee responsibilities conscientiously. She characterized him as emotionally unstable, a trouble maker and constant griper. She stated that she would allow him to treat her family only in an emergency, and would not be honored to have this doctor as a close associate or partner. Mrs. Williams did not testify at the hearings before the medical staff or Board of Trustees or at the trial on the merits.

Mr. Evers, in his reply to the credentials committee questionnaire, also stated that Dr. Truly was emotionally unstable, a trouble maker and a constant griper, and that he had received complaints about his tardiness. Evers also stated that he would not allow Dr. Truly to treat himself or his family, and would not be honored to have Dr. Truly as a partner or close associate.

Mr. Evers testified at one of the hospital hearings and in the trial on the merits. In this court he stated more than once that at the time he wrote those words he meant them, that they were his honest reaction to the questionnaire. It is his present belief that Dr. Truly, by 1980, has undoubtedly matured from the man he knew at Fayette, and urged the hospital to "give him a chance".

The hospital also received a reply in February 1978 to a questionnaire mailed to Ann Brown, the Administrator of Jefferson County Hospital at that time. In her letter she stated that while Dr. Truly was on staff at Jefferson County Hospital she was serv-

ing as office manager and did not know him well, but answered the questions to the best of her ability from the information in the hospital records. She stated that during the four and one-half months he was on staff he admitted 42 patients, adding, "He did not complete his charts when he left. They were completed partially by Dr. Lloyd." Dr. Truly admitted that he left four records incomplete when he departed Fayette.

As for the unfavorable personal remarks, Dr. Truly believed that these were made because of the unpleasant circumstances under which he left Fayette, and the resulting law suit brought by him against Evers. He maintained that their conflicts were political and not based on his professional competence. It should be noted that eight other individuals submitted favorable references for Dr. Truly.

At Madison General Hospital, an Emergency Room physician is an intern or resident who works only in the Emergency Room under the direction of staff physicians. His authority is limited to ER care; only staff physicians can admit patients. Dr. Truly stated on his application that he was a staff physician at Mound Bayou Hospital, but his references from that hospital indicated that he was an Emergency Room physician. Those reviewing Dr. Truly's application at Madison General Hospital concluded that he had deliberately misled them by stating that he enjoyed full staff privileges at Mound Bayou Hospital.

Mark Chastang, former Administrator of Mound Bayou Hospital, testified before this court that Mound Bayou Hospital had the unusual procedure of granting certain physicians full staff privileges, allowing them to commute to Mound Bayou for specified weekends each month to complement the permanent staff. These physicians, of whom Dr. Truly was one, stayed in apartments in town or in mobile homes behind the hospital, worked their weekend, and returned to their regular practice during the week. They were called Emergency Room physicians. The Madison General staff remained unconvinced that this was "full staff privileges" within the accepted meaning of that term.

Physicians, black and white, were unanimous in their belief that there is a shortage of physicians in Madison County creating

a high doctor-patient ratio. Hospital staff physicians emphasized that in this situation, they must be regularly in touch with the hospital, available for service to their patients both after hours and on weekends, and have included this requirement in the by-laws of the hospital.

It is not entirely clear from the testimony exactly how Dr. Truly supported himself during the pendency of his application for staff privileges. He was no longer on the staff of MYL clinic, but apparently carried on some private practice in Jackson, in Canton, and continued with his weekends in Mound Bayou. He owns a home in Jackson, and although the application showed a Canton address, the staff found that he was not listed in the telephone book and was unable to contact him by telephone at the number on the application. This, plus the fact that occasional MYL patients who appeared at the Emergency Room for treatment after normal office hours had told attendants there that they had attempted unsuccessfully to contact Dr. Truly before going to the hospital, led the staff to believe that he was not a resident of Canton, or, more seriously, had "abandoned" his patients; that is, not provided for their care in his absence.

Dr. Truly testified that he had an apartment in Canton, the address given on the application, and "a big Cadillac" which would take him to the hospital in 5 minutes. At one hearing, he told the medical staff that since he does not enjoy staff privileges "what I do after 5 is my private life and so what you are doing is that you are intruding into my private life." As for abandoning his patients, he stated that he instructed them to go to a hospital in Jackson or to Madison General after hours for care. Again, the staff believed this attitude unprofessional, it created an additional burden on them, and was another indication that Dr. Truly could not be relied upon to follow the by-laws of the hospital.

The checkered pattern of Dr. Truly's employment since leaving Meharry Medical College was a matter of concern to the staff. He had worked about a year in Fayette, a year in Jackson at Jackson-Hinds Clinic, carried on sporadic private practices in Jackson, Canton, Mound Bayou and worked for the MYL Clinic; however, he was no longer affiliated with MYL at the time

of the hearings. He was specifically asked if he had left MYL in order to run for public office. This he denied, stating only that he left MYL in order to make more money. Despite the fact that he has been out of medical school for more than six years, he had served no hospital as a regular staff physician since the four months term with Jefferson County Hospital, where he received the unfavorable references.

The Magistrate is of the opinion that the concerns of the staff set out in the ten-point letter were real concerns and valid considerations. In such instances, the courts exercise restraint in setting aside the decision of the hospital Board.

> No court could substitute its evaluation of such matters for that of the Hospital Board. It is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors. The Board has chosen to rely on the advice of its Medical Staff, and the court cannot surrogate for the Staff in executing this responsibility. Human lives are at stake, and the governing board must be given discretion in its selection so that it can have confidence in the competence and moral commitment of its staff. The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. The court is charged with the narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered. In short, so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere.

Sosa v. Board of Managers, supra, at page 177.

The Magistrate is of the opinion that the Hospital staff and Board had ample reason to be concerned about Dr. Truly's past, his present will to follow the Rules and Regulations and Bylaws, and relations with the staff in the future. No one contends that Dr. Truly is not a competent physician, but he has shown a pattern of conflict, insubordination and intemperate behavior. He admitted from the stand that he is arrogant. It is not surprising that the staff thought Dr. Truly would create a difficult and unpleasant working situation in the hospital which would work to the detriment of patient care. The Magistrate cannot disagree with that evaluation.

Finally, the plaintiff submits that he has not received procedural due process in the consideration of his application. The procedure employed by the hospital has been recited in the first pages of this report. Dr. Truly had a total of three hospital hearings at which he had opportunity to present his own evidence, witnesses, and to testify in his own behalf. He was represented by counsel. The sufficiency of due process procedures employed in any situation "must be judged in the light of the parties, the subject matter and the circumstances involved." *Ferguson v. Thomas, supra*, at 856. "Basic fairness and integrity of the fact-finding process are the guiding stars." *Boykins v. Fairfield Board of Education*, 402 F.2d 697 (5th Cir. 1974). These hearings met those requirements.

It is unfortunate that Dr. Truly's medical expertise is not put to greater use in Madison County. His attitude, manner and personality are enormous handicaps which he apparently is unable or unwilling to control. These characteristics are not racial, they are personal. They have hampered his entire medical career, and will continue to do so in the future unless he undergoes a complete change of attitude and acquires a sense of consideration for others.

If this opinion seems unduly harsh toward plaintiff, it is meant only to be constructive criticism by the Magistrate. This physician, as do all of his profession, has the rare and excellent opportunity in our society to contribute to the betterment, not only of his race, but all mankind. Such an opportunity should not be squandered in a foolish contest of wills, but rather his energy should be directed toward improving his relationship with his fellows in the profession; not by inutile attacks in the media and turbulent public demonstrations on his behalf but rather by a quiet and solemn dedication to his duties, obligations and responsibilities, which, in the long run, will earn him the same respect and allow him the same dignity which clothes other physicians in the community.

For the above and foregoing reasons, the Magistrate respectfully recommends that judgment be entered for the defendants.

RESPECTFULLY SUBMITTED,

/C/John R. Countiss, III
UNITED STATES MAGISTRATE

Jackson, Mississippi
August 15, 1980

APPENDIX B

UNITED STATES DISTRICT COURT
Southern District of Mississippi
Jackson Division
Civil Action No. J78-0471

DR. WILLIAM TRULY

Plaintiff

VS.

MADISON COUNTY GENERAL HOSPITAL, et al

Defendant

FINAL JUDGMENT

This cause came on after reference to the United States Magistrate for trial upon Report and Recommendation, and was thereafter tried by the United States on February 11, 12, 13, 14, 15, 20, 21, 22, 29, March 3, 4, 1980, and it appearing that the Magistrate's Report and Recommendation was filed on August 15, 1980, and the transcript of the hearing was filed on October 10, 1980.

And it appearing unto the Court that there has been no objection filed to the Report and Recommendation of the Magistrate, the undersigned United States District Judge, having reviewed the proceedings conducted before the United States Magistrate, together with the Report and Recommendation, hereby adopts and ratifies said Report and Recommendation as the final decision of this Court.

IT IS THEREFORE ORDERED AND ADJUDGED that the complaint filed by the plaintiff is hereby finally dismissed with prejudice and that judgment be entered against the plaintiff with all costs assessed to the plaintiff upon which all proper process may issue.

ORDERED AND ADJUDGED, this, the 12 day of November, 1980.

IC/Harold Cox
UNITED STATES DISTRICT JUDGE

APPENDIX C

Dr. William TRULY,
Plaintiff-Appellant

V.

MADISON GENERAL HOSPITAL, et al.,
Defendants-Appellees

No. 80-3961

United States Court of Appeals,
Fifth Circuit

April 22, 1982

Appeal from the United States District Court for the Southern District of Mississippi.

Before BROWN, GOLDBERG and GEE, Circuit Judges.

GEE, Circuit Judge:

The terrain of this appeal is dark and bloody, the scene of many bygone struggles. As a result of these, the principles that govern our review of the proceedings below are well settled, and little more is required of us than fitting the facts presented to the law's existing matrix.

Dr. William Truly, a black physician, brought this action, asserting violation of his civil rights guaranteed by 42 U.S.C. § 1983 and other enactments. This is said to have occurred in the course of denial to him of staff privileges at a small public hospital, the defendant in the case. He went to trial below on three assertions: that this denial was based on his race[1] or on the exer-

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[1] This contention is not brought forward on appeal, perhaps because the evidence shows that two of the three black physicians who have sought admission to the hospital's small medical staff were granted full privileges, only Dr. Truly being refused.

cise by him of various constitutional rights and that he was not accorded due process at the administrative level. Trial of his case to a magistrate produced a report and recommendation adverse to Dr. Truly's contentions. This was adopted by the district court, which entered judgment against him. His appeal to us abandons the racial contention and is limited to two complaints: the asserted want of procedural due process in the administrative decisions below and the denial of staff privileges based on his exercise of rights — such as that of free speech — protected by the first amendment. Both of these areas were the subject of numerous fact-findings below, and as to these Dr. Truly's appeal confronts the "clearly erroneous" standard of review specified in Rule 52(a), Federal Rules of Civil Procedure. Since a review of the record evidence does not leave us with "the definite and firm conviction that a mistake has been committed"[2] in these findings, and since they adequately support the judgment below, we must affirm it.

[1,2] We are spared the search for or detailed exposition of those general principles that govern such appeals as this by the opinion in *Sosa v. Board of Managers of Val Verde Memorial Hospital*, 437 F.2d 173 (5th Cir. 1971), written by a member of this panel and often and generally cited with approval both in our circuit and elsewhere. Briefly speaking, these principles are that physicians obtain by mere licensure no constitutional right to staff privileges at any particular hospital and that additional standards beyond minimum criteria may be imposed so long as they are reasonable and related to the operation of the hospital.[3] Procedural due process must be accorded at administrative hearings concerned with passing on such qualifications, but subjective values may be given a place, and great latitude must be ac-

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[2] *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948), and authorities collected at Wright & Miller, *Federal Practice & Procedure: Civil* § 2585 (1971).

[3] Examples of these offered by the opinion are "professional and ethical qualifications of the physicians or the common good of the public and the Hospital," *citing Foster v. Mobile County Hospital Board*, 398 F.2d 227, 230 (5th Cir. 1968). *Sosa*, 437 F.2d at 176.

corded the hospital's governing authority both in prescribing and in evaluating all such matters. Bearing these principles in mind, we turn again to the matter in hand.

Procedural due process.

An initial application for staff privileges by Dr. Truly in 1973 was denied by the defendant hospital on the ground that he was not a local resident. In August of 1977, having become a resident, he submitted a new application. This was also denied, apparently at least in part on the stated ground that some of his current references had not responded to the hospital's inquiry, and it had therefore fallen back on two unfavorable responses to references given in his 1973 application. In December of that year, Dr. Truly requested reconsideration, advising that his references had informed him that they had not received the hospital's inquiry regarding him. This was granted.

Shortly thereafter, in March 1978, appellant requested the specific reasons for the hospital's earlier denial of his application. The hospital responded promptly, listing ten reasons that we set out in the margin.[4] Within the week, on April 18, 1978, Dr.

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[4]

1. That the references supplied on your original application for staff membership were unsatisfactory and there has been no explanation with respect to those references made to the hospital.
2. That the current response of the administrator of the Jefferson County Hospital, Fayette, Mississippi, indicated that while on the staff of that hospital the applicant kept poor medical records and further that the applicant never completed his medical records upon leaving the hospital and as such admission of the applicant to the medical staff of Madison County General Hospital could jeopardize the necessary accreditation of the hospital by the Professional Standards Review Organization.
3. That the statement made on the application showing medical staff membership at Mound Bayou Community Hospital was misleading as the membership is as an emergency room physician and that no sufficient explanation has been made to Madison General Hospital explaining how the applicant could have full staff duties at the Mound Bayou Community Hospital and maintain a private family practice in Canton, Mississippi, despite a specific request for that explanation.

/continued ...

Truly's attorney replied, stating that the response of the hospital "listed several items that require more specific particulars" for Dr. Truly to prepare an adequate presentation at the approaching hearing set for May 18. The items listed were number 5 (complaints about Dr. Truly's unavailability after regular hours) and number 8 (concern about Dr. Truly's ability to work with hospital administration and staff, in view of numerous instances of his "severe public criticism" of both in recent years).[5] The hospital refused to elucidate, beyond advising, as to the first, that further information about it was unavailable because of the physician-patient privilege and, as to the second, that it was to be found at any local television station or newspaper.

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footnote [4] continued/...

4. Inability of the hospital to ascertain the actual home residence of the applicant despite the showing of a Canton, Mississippi, address on the application.

5. Inability of applicant's patients and employees to find the applicant for medical treatment after office hours and unavailability of applicant to patients in times of crisis.

6. Insufficient explanation of relatively short employment time at previous references and no explanation for leaving most recent employment at the Madison-Yazoo-Leake Family Health Center.

7. Lack of sufficient medical credentials and experience upon which the medical staff could make a reasonable decision with respect to the professional competence of the applicant to be on the medical staff.

8. Concern over probable inability of applicant to work with the Administration and staff of Madison General Hospital as evidenced by numerous instances of severe public criticism of the Administration and staff by the applicant during the last few years.

9. Concern because of the apparent inability of the applicant to follow the By-Laws and Rules and Regulations of the hospital in the resolution of problems that might arise if the applicant were a member of the medical staff.

10. Over-all concern of the members of the medical staff that they would not be able to effectively work with the applicant to care for patients in the hospital and therefore that the applicant's membership on the active medical staff, considered in light of all aspects of the applicant's application and the medical staff's investigation of that application could jeopardize the hospital's accreditation and licensure.

[5]The treatment of a third, item 9 (concern about the ability of Dr. Truly to follow rules and by-laws) is not complained of here. We must assume that, as to the seven other reasons assigned, Dr. Truly felt sufficiently informed.

At the latest, Dr. Truly learned at the hearing that the criticism referred to was that voiced by him on a 1975 television interview program in which he did, indeed, severely criticize the hospital — justly or unjustly — for providing substandard care to black patients and that the complaint of his unavailability referred to his reference of patients to local hospitals for after-hours and weekend care since he did not enjoy staff privileges.

The medical staff again recommended denial of privileges, and, at a later hearing, the hospital's board of trustees denied them to Dr. Truly.

[3] Whatever views we may hold regarding these administrative proceedings, none are material at this juncture save those that regard the adequacy of notice given Dr. Truly, from the point of view of procedural due process, of the reasons for the denial to him of staff privileges. That is his complaint to us. On the record before us, we cannot agree with this contention. The notice given Dr. Truly concerned his own relatively recent activities, activities which he admitted at trial that he had engaged in and which the reasons given should have easily called to his recollection and attention. Indeed, the specificity of the reasons given him is clearly sufficient to comply with the requirements of our own system of "notice pleading" that, whatever its deficiencies from a common-law viewpoint, has been held constitutionally sufficient in a myriad cases. What he essentially seeks to have us require, as a constitutional matter, amounts to the pleading of evidence. We do not require this of litigants, we cannot require it of the hospital, and we cannot hold administrative proceedings deficient on this ground. More particularization might have been helpful to Dr. Truly — though a review of the record gives no hint of surprise on his part or that of his counsel or of a need for more time to meet matter presented — but we cannot require it as a constitutional proposition.[6]

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[6]The sole authority cited us on this point by appellant is *Birnbaum v. Trussel*, 371 F.2d 672, a 1966 decision of the Second Circuit with which we find no fault. There, however, as appellant's brief notes, the physician was denied any statement whatever of the charges made against him and was summarily dismissed when he refused to appear at a hearing before the medical board without having received one, a far cry from what we find here.

Exercise of constitutional rights.

[4] Dr. Truly next contends that his public criticism of local physicians and his involvement in politics were made substantial or motivating factors in the decision to deny him staff privileges and that, since these were constitutionally privileged activities, they could not properly be so used. As to this contention, however, he confronts the fact-finding that it was not the exercise of these rights that caused the denial but rather Dr. Truly's posture throughout the course of the entire proceeding. This is described by the fact finder as that of "a self-oriented individual demanding that things be done only his way," as exhibiting "a pattern of conflict, insubordination and intemperate behavior," and as being overbearing and arrogant.

Much record evidence supports this characterization. Among other examples, the record shows that, discharged from an earlier position with a clinic at Fayette, Dr. Truly left without completing patients' records. To one who initially gave him an unfavorable reference, Mayor Charles Evers of Fayette, Mississippi, Truly wrote a letter exhorting him to retract it, primarily on the grounds of racial loyalty. In the same letter he threatened suit against another who had given him an unfavorable reference — for failing to maintain accurate medical records and for being emotionally unstable and a constant griper — and had refused to retract it. At one staff hearing, he advised the board, in response to inquiries about why patients could not locate him after hours, that since he did not enjoy staff privileges what he did after five o'clock was his private business into which they had no right to intrude. The magistrate found as well that the staff's ten concerns, set out above at note 4, were real and honest ones, supported by the evidence. This also is borne out by the record. In short, the reasons advanced for denying staff privileges to Dr. Truly are sufficient and are supported by the evidence.

[5,6] One does not always insure his own retention in employment by wrapping oneself in the first amendment and launching attacks on one's employer from within its folds. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). At some point, while the employer

has no right to control the employee's speech, he does have the right to conclude that the employer's exercise of his constitutional privileges has clearly over-balanced his usefulness and destroyed his value and so to discharge him. *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970). We think the same principles generally apply to the situation of one, like Dr. Truly, seeking to obtain a position or privilege. It follows that where, as here, both constitutionally protected and other conduct is in question, the three-step process of *Mt. Healthy* is applicable. First, the complainant bears the burden of showing that relevant conduct is constitutionally protected; second, that it was a substantial or motivating factor in the unfavorable action taken with reference to him. These burdens carried, the employer or person similarly situated — in this case, the hospital — may, third, seek to prove that it would have done the same regardless of the protected conduct. *Mt. Healthy, supra* at 287, 97 S.Ct. at 576.

Here Dr. Truly failed at the second hurdle when the court found that something else, and not his exercise of constitutional rights, motivated the refusal to him of staff privileges.[7] Whether we might have so determined is of no moment; the record is such that the fact finder was empowered to do so.

AFFIRMED.

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[7]Such a finding is one of fact, subject to review under the "clearly erroneous" standard. *Bowen v. Watkins*, 669 F.2d 979, 983 (1982).

APPENDIX D

CONFLICTING OPINION

Ferguson v. Thomas, 430 F.2d 852.

Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568 50 2 Ed 2d 471 (1977).

APPENDIX E

CERTIORARI JURISDICTION

Act of June 25, 1948, ch. 646, Pub. L. No. 773
62 Stat. 928 [28 U.S.C. § 1254]

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

CIVIL RIGHTS JURISDICTION

Act of September 9, 1957, Pub. L. No. 85-315,
§ 121, 71 Stat. 637 [28 U.S.C. § 1343]

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

CIVIL RIGHTS ACT OF 1871

SECTION 1. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 [42 U.S.C. § 1983]

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

CIVIL RIGHTS ACT OF MAY 31, 1870

§1, 90 Stat, 2641
[42 U.S.C. § 1981]

§1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

RELIEF FROM JUDGMENT

Fed. R. Civ. P. Rule 60

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes: Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Office-Supreme Court, U.S.
FILED
ALEXANDER L. STEVAS,
CLERK

NO.
82-250

IN THE
Supreme Court of the United States
October Term, 1982

DR. WILLIAM TRULY, *Petitioner*

v.

Madison General Hospital
Sidney L. Whittington, Jacob M. Ritchey
Hite Wolcott, Donald Hawkins, L. C. Harris,
Strickland Sligh, Dr. T. O. Bailey,
Dr. G. A. Carmichael, Dr. Joe W. Terry,
Dr. C. H. Heywood, Dr. A. P. Durfey, Jr.,
Dr. Mitchell B. Wells, Dr. Allen G. Roark,
Dr. William B. Featherston, and
Dr. Robert Surratt
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Date: September 2, 1982

QUESTIONS PRESENTED

The Respondents would deny that the "Questions Presented" by the Petitioner to this Court in this case are proper questions to be presented to this Court as both of the "Questions Presented" seek to re-litigate facts already litigated and reviewed by the two Federal Courts which have previously considered this matter. Respondents submit that there are no questions of law, arising out of this case, requiring the review of this Court.

PARTIES TO THIS PROCEEDING IN THE COURT OF APPEALS

Plaintiff-Petitioner

Dr. William Truly

Defendants-Respondents

Madison General Hospital
Sidney L. Whittington
Jacob M. Ritchey
Hite Wolcott
Donald Hawkins
L. C. Harris
Strickland Sligh
Dr. T. O. Bailey
Dr. G. A. Carmichael
Dr. Joe W. Terry
Dr. C. H. Heywood
Dr. A. P. Durfey, Jr.
Dr. Mitchell B. Wells
Dr. Allen G. Roark
Dr. William B. Featherston
Dr. Robert Surratt
Dr. E. G. Spivey, Jr.

TABLE OF CONTENTS

Questions Presented..... i

Parties to the Proceeding in Court of Appeals.... ii

Prior Opinions..... 2

Jurisdiction..... 2

Statutes Involved..... 2

Statement..... 3

Reasons for Denying the Writ..... 4

Conclusion..... 9

Table of Authorities

Cases

Bowen v. Watkins, 669 F.2D 979, 984 (5th Cir. 1982)..... 8
Dixon v. Alabama State Board of Education, 294 F.2d, 150 (5th Cir. 1961)..... 6, 7
Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970) 6, 7
Hayman v. Galveston, 273 U.S. 414 (1927)..... 9
Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d, 471 (1977).... 7
Truly v. Madison General Hospital, 673 F.2d, 763 (5th Cir. 1982)..... 2, 5

Statutes

28 U.S.C., Section 1254 (1)..... 2
42 U.S.C., Section 1983..... 3

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Hite Wolcott, Donald Hawkins, L. C. Harris,
Strickland Sligh, Dr. T. O. Bailey,
Dr. G. A. Carmichael, Dr. Joe W. Terry,
Dr. C. H. Heywood, Dr. A. P. Durfey, Jr.,
Dr. Mitchell B. Wells, Dr. Allen G. Roark,
Dr. William B. Featherston, and
Dr. Robert Surratt
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents pray that a Writ of Certiorari be denied in this cause.

PRIOR OPINIONS

The Respondent states unto this Court that the opinion of the United States Court of Appeals for the Fifth Circuit in this case may be found as reported in *Truly v. Madison General Hospital,* 673 F.2d., 763 (5th Cir., 1982); and would further state that the unreported "Report and Recommendation of the United States Magistrate" and "Final Judgment" of the United States District Court for the Southern District of Mississippi are accurately reproduced in Apendices "A" and "B" of the Petition filed by Petitioner with this Court.

JURISDICTION

The Respondent agrees that the jurisdiction of this Court can be invoked in this Court through 28 U.S.C. §1254 (1).

STATUTES INVOLVED

The Respondents agree that the Federal Statutes and Amendments to the Constitution of the United States as cited by the Petitioner have been previously raised in this case. The Respondents deny that the Statutes of the State of Mississippi cited by the Petitioner have any application whatsoever to the determination of this case.

STATEMENT OF THE CASE

This case was brought by the Petitioner, Dr. William Truly, a black physician, asserting that the Respondent, Madison General Hospital, a small public hospital, violated the Civil Rights guaranteed to the Petitioner by 42 U.S.C. §1983 and other enactments, when Respondent denied medical staff privileges to the Petitioner.

The Petitioner filed suit for injunctive relief from the United States District Court for the Southern District of Mississippi on the basis that his denial of staff privileges was based on his race or on the exercise by him of various Constitutional Rights and that he was not accorded procedural due process at the administrative level. The case was tried before a Magistrate and resulted in a Report and Recommendation adverse to the Petitioner. The Report and Recommendation of the Magistrate was adopted by the District Court which entered Judgment against the Petitioner.

An appeal of the Judgment of the District Court was taken to the Court of Appeals for the Fifth Circuit. In this appeal, the Petitioner abandoned his race claim and made the same arguments that are being presented to this Court for review: 1) That the Petitioner was not afforded adequate procedural due process at the administrative level; and 2) That the denial

of staff privileges to the Petitioner was based on an exercise of rights protected by the First Amendment.

The Fifth Circuit Court of Appeals reviewed the record in the case and the arguments of the Petitioner and found that there had been numerous findings of fact adverse to the Petitioner in the Trial Court and further found that the findings of fact were supported by the evidence in the case and were not clearly erroneous as alleged by the Petitioner.

The Court of Appeals then found that the District Court had properly applied the law to the facts established and found that the Petitioner had been accorded procedural due process at the administrative level and further found that, according to the findings of fact, the exercise of First Amendment Rights by the Petitioner was not a substantial or motivating factor in the denial of medical staff privileges to the Petitioner. The Court of Appeals for the Fifth Circuit affirmed the Judgment of the District Court and it is for that Judgment that the Petitioner is seeking a Writ of Certiorari to issue from this Court.

REASONS FOR DENYING THE WRIT

There are no propositions of law set forth in the Petition, by Petitioner, to this Court which have not been fully and

completely addressed and decided, in accordance with Constitutional principles and case law precedent, by the lower Courts.

1) The Petitioner complains that the rulings by the United States District Court for the Southern District of Mississippi and the United States Court of Appeals for the Fifth Circuit will act to narrow the scope of procedural due process to which an individual is entitled in an administrative proceedings. The opinions of both Courts clearly show that the procedural due process argument was advanced at both the trial and appellate levels without success.

The issue of procedural due process is an issue of fact. The facts of this case, as found at trial by the Magistrate and reviewed on appeal by the Court of Appeals, established to the satisfaction of those Courts that procedural due process requirements had been met by the Respondents. The Court of Appeals, in their opinion, even stated that the notice given to the Petitioner by the Respondent was sufficient to comply with the system of "notice pleading" which is used in the Federal Court System and has been approved by this Court. *Truly v. Madison General Hospital,* 673 F.2d 763 at 766 (5th Cir., 1982).

The Petitioner mistakenly cites *Ferguson v. Thomas*, 430 F.2d, 852 (5th Cir., 1970), as a conflicting opinion to the one delivered by the Court of Appeals in the case at bar. The Petitioner states that the decision of the Court of Appeals in the case at bar narrows the minimum procedural due process requirement as required by the *Ferguson* case. A reading of the *Ferguson* case reveals the misapplication of this position. The Court of Appeals in the *Ferguson* case stated:

> "The rudiments of due process fair play in school administrative proceedings have been well outlined in this circuit with regard to the rights of college students who were subjected to the disciplinary suspensions. They are entitled to a statement of the charges against them, the names of witnesses, the nature of the testimony of those witnesses and the opportunity of presenting a defense. *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir., 1961). These same minimum standards are applicable to teachers who have an expectancy of reemployment. However, the standards of procedural due process are not wooden absolutes. The sufficiency of procedures employed in any particular situation must be judged in the light of the parties, the subject matter and the circumstances involved." *Ferguson v. Thomas*, 430 F.2d. 852 at 856.

The Respondent would submit to this Court that nothing in the Court of Appeals opinion in the case at bar changes or conflicts with the opinion in the *Ferguson* case at all. If anything, the opinion of the Court of Appeals in the case at bar might further define the general principles stated in the *Ferguson* case, but the opinion changes no substantive or procedural law.

2) The next contention of the petition is that the finding of fact of the Trial Court – that the exercise by the Petitioner of his First Amendment Rights was not a substantial or motivating factor in the denial of medical staff privileges to the Petitioner – was clearly erroneous and contrary to law and against the overwhelming weight of the evidence. The Petitioner, however, fails to inform this Court that the Court of Appeals was presented with this identical argument and disposed of it in accordance with the previous rulings of this Court.

The Court of Appeals stated in their opinion in the case at bar:

> "One does not always insure his own retention in employment by wrapping oneself in the first amendment and launching attacks on one's employer from within its folds. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). At some point, while the employer has no right to control the employee's speech, he does have the right to conclude that the employee's exercise of his constitutional privileges has clearly overbalanced his usefulness and destroyed his value and so to discharge him. *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970). We think the same principles generally apply to the situation of one, like Dr. Truly, seeking to obtain a position or privilege. It follows that where, as here, both constitutionally protected and other conduct is in question, the three-step process of *Mt. Healthy* is applicable. First the complainant bears the burden of showing the relevant conduct is constitutionally protected; second, that it was a substantial or motivating factor in the unfavorable action taken with reference to him. These burdens carried, the employer or person similarly situated – in this case, the hospital – may, third, seek to prove that it would have done the same regardless of the protected conduct.

> Here Dr. Truly failed at the second hurdle when the court found that something else, and not his exercise of constitutional rights, motivated the refusal to him of staff privileges.[7] Whether we might have so determined is of no moment; the record is such that the fact finder was empowered to do so. *Mt. Healthy,* supra at 287, 97 S.Ct. at 576.
>
> [7]Such a finding is one of fact, subject to review under the "clearly erroneous" standard. *Bowen v. Watkins,* 669 F.2d 979, 984 (5th Cir. 1982).

This clearly shows that the Court of Appeals carefully followed the guidelines sent to them by this Court in the *Mt. Healthy* case. The Court of Appeals carefully considered the protections afforded by the First Amendment to the Constitution recognizing that the record of the case provided a different picture than that presented by the Petitioner in his appeal to the Court of Appeals

The Petitioner now seeks review from this Court by also misrepresenting facts which have previously been considered and decided by two Courts. The First Amendment is under no danger of dilution by the Opinion rendered by the Court of Appeals and nothing in that Opinion conflicts with this Court's ruling in the *Mt. Healthy* case. The danger present is that this Court is being asked by the Petitioner to adjudicate facts that have previously been decided and reviewed by two Courts. The granting of certiorari by this Court in this case would open the flood gates of litigation and appeal to this Court even further; and would actually undermine the ac-

tivities of the Courts at the lower levels in the Federal Court System. Neither this Court nor the entire Federal Judiciary System should be subject to that subterfuge.

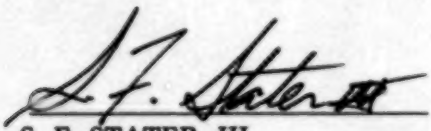
Respondent would finally submit to this Court that Petitioner is incorrect in his Petition in referring to medical staff privileges at a public hospital as public employment. This Court has found long ago that a physician does not have a Constitutional Right to practice his profession in a public hospital. *Hayman v. Galveston,* 273 U.S. 414 (1927).

CONCLUSION

The considerations given the claims of the Petitioner, by the Respondents, at the administrative level; by the U. S. District Court for the Southern District of Mississippi, at the trial level; and by the Court of Appeals for the Fifth Circuit, at the appellate level; are evidence of the fact that the Petitioner was granted every Constitutional and procedural safeguard to which even public employees are entitled in employment disputes. No legal precedents are in conflict with the actions of the Respondents, the Trial Court or the Court of Appeals and no Federal question is raised which has not been previously settled by this Court. Therefore, in accordance with Rule 17 of this Court, the Respondent respect-

fully submits that the Writ of Certiorari petitioned for in this case should be denied.

Respectfully submitted,



S. F. STATER, III
Of Montgomery, Smith-Vaniz and Stater
Attorneys for Respondents

CERTIFICATE OF SERVICE

I, S. F. Stater, III, attorney of Record for the Respondents in the above entitled action, hereby certify that I have this day, postage prepaid, by United States Mail, mailed a true and correct copy of the foregoing Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, upon the Honorable Edward Blackmon, Jr., Blackmon & Smith, P. O. Drawer 568, Canton, Mississippi 39046.

THIS 8th day of September, 1982.

S. F. STATER, III